

LY (Migration) [2018] AATA 5768 (13 December 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mrs Josie Dung Kim LY
VISA APPLICANTS:	Mr Quoc Mung Ngo Mr Duc Dat Ngo
CASE NUMBER:	1713036
DIBP REFERENCE(S):	OSF2016/038346
MEMBER:	Michael Cooke
DATE:	13 December 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations

Statement made on 13 December 2018 at 4:43pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Spouse (Provisional)) – parties in genuine and continuing spousal relationship – Vietnamese Marriage Certificate provided – definition of spouse – mutual commitment to shared life to exclusion of others – parties live together permanently – husband enjoys good relationship with ex-wife – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15A, Schedule 2, cls 309.211, 309.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 6 May 2017 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (the visa applicant) applied for the visa on 10 June 2016 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the parties did not meet the definition of spouse.
4. The review applicant sponsor appeared before the Tribunal on 29 August 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant.
5. The review applicant was represented in relation to the review by her registered migration agent.
6. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the parties are in a genuine and continuing spouse relationship.

SPOUSE/DE FACTO (cl.309.211(2), cl.309.221)

Whether the parties are in a spouse or de facto relationship

8. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship.: On the evidence (a Vietnamese Marriage Certificate), the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

- Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.
11. The parties live in different countries which makes a financial relationship difficult. The Tribunal gives thus little weight to this consideration.
 - Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.
 12. The parties live in different countries which makes a financial relationship difficult. Nevertheless they have evidenced living together in Vietnam when the sponsor has travelled to Vietnam. The Tribunal is satisfied that when possible the parties have conducted a household-like relationship.
 - Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
 13. The parties have maintained extensive telephone traffic whilst the sponsor has visited Vietnam many times. The parties have submitted additional information such as photos of their time together. The photographic evidence indicates that they hold themselves out to be spouses and are accepted as such by family and friends.
 14. The Tribunal is satisfied that the social relationship between the parties is a spousal one.
 - Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
 15. The parties met in Malaysia in April 2105. They married on 25 March 2016 after a second proposal. Their wedding was celebrated with the sponsor's mother, adoptive mother, sister and children present who had travelled from Australia to attend the wedding. The sponsor's personal plea to the Tribunal is that she and the applicant see the relationship as long-term and they share a special relationship and that each time they separate it is wrenching for both of them.
 16. The Tribunal has views additional information and is satisfied that the parties have the required mutual commitment of a spousal couple.
 - Any other relevant considerations.
 17. The delegate was concerned that the sponsor initially met the applicant when he had accompanied his ex-wife and children on a holiday trip. The sponsor has explained that her

husband still enjoys a good relationship with his ex-wife though the ex-wife now has a new partner. Normally this issue would be of concern to the Tribunal due to it being a situation of possible non-exclusivity. However, considerable information has been received by the Tribunal which has disabused it of this perception. Furthermore, the sponsor's mother, adoptive mother, sister and children travelled from Australia to attend the wedding with the applicant. This is hardly indicative of there being any possibility that the applicant's prior marriage was on-going. The sponsor has also indicated that the children from the blended relationship have all met each other socially and accepted the marriage.

18. The Tribunal has considered r.1.15A(3) matters and makes the following findings against s.5F(2)(b)-(d). The parties have a mutual commitment to a shared life to the exclusion of others; a genuine and continuing relationship; and they live together or not separately and apart on a permanent basis.
19. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
20. Therefore, the visa applicant meets cl.309.211 and cl.309.221.
21. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

22. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations

Michael Cooke
Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).